No. 22,801

IN THE

United States Court of Appeals

For the Ninth Circuit

NEILA A. AUTENRIETH, et al.,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Northern District of California

APPELLANTS' REPLY BRIEF

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INTRODUCTORY TO THE ARGUMENT

The United States, Appellee in this case, presents a two-pronged argument in support of its contention that the dismissal of the Complaint by the District Court was proper. The first contention is expressed on page 11 of the Government's Brief to the effect that

> "It is one thing to compel a person to take part physically in combat or to wear a military uniform against his religious convictions and an entirely different matter to have him support his government in all of its operations through the neutral act of paying taxes."

As we shall show hereafter, under the circumstances set forth by the Complaint, the paying of taxes is not a neutral act, and we shall also show that the Appellee's conclusion based on a faulty premise must by necessity become faulty and the fact is that it is to do violence to the spirit of the Constitution to say that:

> ". . . Congress effects no invidious or arbitrary discriminations when it relieves a conscientious objector from bearing arms and requires others, whose consciences are likewise offended by the conduct of war, . . ."

if the latter group is forced to participate in war by means of payment of war taxes.

The second contention of the Government is that Appellants failed to articulate a

> ". . . theory by which the First Amendment—solely because of the depth of their feeling on this issue—may be seen as a restraint on congressional action."

We believe that our original Brief did articulate a theory contrary to Appellee's contention. However, in our further argument, we will re-articulate the same, particularly because our original argument was bottomed not "wholly" on Appellants' depth of feeling, but rather it placed their conscientious objection to war in any form into the center of their moralistic religious concept.

ARGUMENT

I

THE DISTINCTION DRAWN BY THE APPELLEE BETWEEN PHYSICAL PARTICIPATION IN WAR AND CONTRIBUTION TO THE WAR EFFORT BY OTHER MEANS SUCH AS PAYMENT OF TAXES IS AN ARTIFICIAL ONE AND REPRESENTS, IN FACT, AN INVIDIOUS AND ARBITRARY DISCRIMINATION IN DISFAVOR OF THE APPELLANTS.

Appellee argues that it is permissible, and in fact, proper to give statutory exemption from military service to those whose religious scruples prevent them from doing particular personal acts—engaging in hostilities or military service. They further argue that the statutory exemption does not go to the payment of federal taxes or those parts thereof which go to support the war. Appellee also argues (p. 12 of their Brief) that the Appellants

> ". . . here make no claim that the payment of taxes is itself an act contrary to their religious beliefs."

As to the latter statement, we respectfully disagree, and state to the contrary, that the whole tenor of our Opening Brief centered upon the claim that payment of war taxes by Appellants represents their direct participation in war and their opposition thereto is the center of their moral and religious beliefs.

While the United States here argues that there is a basic distinction between contribution to the war extended in the form of such personal acts as engaging in hostilities or wearing a military uniform and other kinds of personal contributions, strangely or not so

strangely, the United States heretofore argued consistently to the contrary, and in fact, it was able to convince the Courts that no such distinction can be made. In the case of *Perry Bowen Moore v. United States,* 217 F 2d 428, 348 US 966, 75 S Ct 530, the United States successfully argued that one may not contribute to the war effort by working as a laborer in a candy factory which sells part of its products to the Armed Forces without losing his status as a conscientious objector.

Perry Moore's claim as a conscientious objector was denied by his Selective Service Board even though it was admitted that his religious training and beliefs clearly brought him within the purview of the Congressional grant of exemption. The church to which he belonged (the Harshmanite Church of Sullivan, Illinois) was recognized by the Government to be a fundamentalist pacifist church. It was recognized that the church's pacifist position brought about antagonism towards it and its members on the part of the community, and the antagonism during the First World War grew to such an extent that the Harshmanite Church members were unable to obtain employment in the community. To keep alive, some members organized a little factory, making ladies' aprons, candy, and later, garden tractors and implements thereto. The factory employed both church and non-church members and among the former was Perry Moore, who was working as a common laborer. During World War II, the candy department of the establishment was unable to obtain Government allotments of

sugar unless it agreed to sell part of its products to the Armed Forces. It did sell approximately 4% of the candy products to the Air Force which put the candy so obtained into emergency survivor kits in its planes. This church industry also sold ladies' dresses to be used by the female members of the Armed Forces. Under the above circumstances, the United States Court of Appeals for the Seventh Circuit, in its holding of December 9, 1954 (supra) concluded that Moore's claim for exemption as a conscientious objector may be properly denied by Selective Service on the ground that

> "His church on whose tenets his claim of exemption rests, though devoted to pacifist doctrines, *contributed to the war efforts of this country by manufacturing supplies and equipment for the Armed Forces.*" (emphasis ours)

By so holding, the Court of Appeals of the Seventh Circuit agreed with the Government's contention that no such distinction can be made between contributions to the war effort as is now urged by Appellee. In fact, the impact of the Government's argument in the *Moore* case and the decision of the Court of Appeals is plain, and that is that a **conscientious objector to war must not—on penalty of forfeiting his previous status as a conscientious objector—contribute to war in any form, such as paying that part of his taxes that is used for the purchase of military equipment or is used for the payment to military personnel.**

The position taken by the United States in the *Moore* case appears clearly from its Brief before the

Supreme Court of the United States (No. 521, October term, 1954, 348 US 966). The Government contended that *Moore* was denied conscientious objector status because

> "His religious community had no compunction against acting as a war contractor for the Government during World War II, and apparently was content to profit from the war situation as a direct supplier to the war effort. *Such willingness to cooperate toward the prosecution of the war is entirely inconsistent with conscientious objection to a non-combatant participation in war in any form.*" (emphasis added)

Appellants submit that their contribution of tax money to buy military equipment is just as inconsistent with their claim as conscientious objectors as was claimed by the United States that *Moore's* working as a common laborer was in the case heretofore cited. Appellants submit that the contribution of tax money to war is more direct since it is made by the individual himself, while a common laborer as *Moore* was has no say-so about the factory supplying its customers.

(The *Moore* case was reversed *per curiam* on other grounds, namely that he and his witnesses tendered by him declined, because of religious scruples against oath-taking, to use the word "solemnly" in affirming to tell the truth. The Trial Court refused to permit them to testify. The Supreme Court held that there is no requirement that the word "solemnly" be used in the affirmation, and therefore the judgment of conviction was reversed.)

The Government recognized Moore's sincerity as did the Trial Court in the instant case recognized for the purpose of the order dismissing the Complaint

> ". . . that the belief in non-payment of taxes for war purposes constitutes a sincere and religious tenet."

About *Moore* and his church, the Government's Brief before the Supreme Court of the United States, (348 US 966, 75 S Ct 530), stated:

> "He and his church were opposed to force. He and his colleagues never struck a blow in anger or in self-defense. They held no malice for harm done to them by others. When their congregation was fired upon during a religious meeting, none of the members appeared to testify against the would-be murderers. They submit quietly and without reprisal to indignities, insults and even assaults."

After thus recognizing the posture taken by the church and church members as total opposition to war, the Government turned, as it were Janus' face, and contended that Moore, a member of the church, working as a common laborer in the factory which supplied 4% of its candy products to the Armed Forces of the United States, under compulsion was nevertheless

> ". . . engaged in supplying material under Government contract for shipment to the Armed Services. **His position was no less proximate to the fighting than any stateside troops of the Supply Services.**" (emphasis added)

The contention of the United States in the *Moore* case and the decision of the Court of Appeals for the

Seventh Circuit (217 F 2d 428) forced a conclusion that a conscientious objector must refuse to make any contribution to war and must also repudiate any willingness to do so. He must refuse to pay moneys for war. If he fails to do so, he forfeits his right to claim exemption to military service. That he must repudiate any willingness to make contribution to the war effort may be seen from the Government's argument in the *Moore* case where the young factory worker was chastised by the Government because

> ". . . at no time has he repudiated the stand taken by his church in the manufacture of war supplies. . ."

and the Government concluded that he was not entitled to a classification as a conscientious objector.

The Supreme Court of the United States seems to be of the same opinion as it appears from *Witmer v. United States,* 348 US 375, 75 S Ct 392. *Witmer* refused to be inducted in the Armed Forces after his claim for exemption as a conscientious objector was denied by his Local as well as by his Appeal Board. The District Court found him guilty of refusing to obey the order of induction, and the conviction was upheld by the Supreme Court because his sincerity as a conscientious objector was doubted

> "Although he asserted his conscientious objector belief in his first exemption claimed, in the same set of papers he promised to increase his farm production and 'contribute a satisfactory amount for the war effort'. Subsequently, he announced 'the boy who makes the snowball is just as responsible as the boys who throw them.' "

The Supreme Court, while not informing us whether it agreed with the first or the second of *Witmer's* quoted statements above, concluded

> ". . . these inconsistent statements in themselves cast considerable doubts on the sincerity of petitioner's claim . . ."

of being a conscientious objector.

Appellants here say with *Witmer* that

> ". . . the boy who makes the snowball is just as responsible as the boys who throw them."

Because of that they proposed in their Complaint to maintain a consistent position by declaring that they are unable to contribute that part of their taxes which are used for war. By doing so, they hope to escape the burden that would and undoubtedly could be placed upon them by the *Witmer* decision which is so obviously applicable here.

The United States took the position now maintained by the Appellants in the case of *United States v. Van Hook,* 284 F 2d 489 (7th Cir.) (reversed on other grounds, 365 US 609). The defendant *Van Hook* was an employee of the same factory and member of the same church to which *Moore* belonged, and there the Government argued that the Local Board was justified in denying *Van Hook's* classification as a conscientious objector because of his willingness to work for the church enterprise which produced

> ". . . WAC uniforms, candy for army rations . . ."

The Government of the United States, Appellee here, consistently maintained the position that is now

taken by the Appellants here and which is not hotly contested by the Appellee.

In the case of *United States v. Malcolm Parker,* 307 F 2d 585 (7th Cir.) the Government contended that *Parker* was justly deprived of his conscientious objector classification because he too was willing to work as a laborer

> ". . . for Community Industries Ltd., a Harshmanite enterprise which produces WAC uniforms, candy for army rations . . ."

and that *Parker* subscribed to the belief and opinions of the Harshmanites. The Government convinced the Seventh Circuit that the District Court did not err in deciding that there was a basis-in-fact for the denial of an objector classification, and therefore, his induction order was valid and his refusal to abide by the order was properly punished.

Parker filed a Petition for Writ of Certiorari in the Supreme Court of the United States under No. 516, October Term, 1962, (371 US 938, 83 S Ct 319). The Government of the United States filed its Brief in Opposition and stated, among others, that on the basis of the Trial record, it appeared

> ". . . that although Community Industries Ltd. (for whom Parker worked) does not manufacture munitions in the ordinary sense of the word, they do manufacture other items for military consumption such as tents, WAC uniforms, candy for rations . . . and other items . . . The registrant concluded by verifying that all of the above beliefs and opinions of the Harshmanites, in general, are also his own personal beliefs and

> opinions." (page 4 of United States of America's Brief in Opposition)

The Government's Brief in Opposition also stated that *Parker* contended that

> ". . . the goods that we manufactured for use in the Army or Navy could be used by civilians too. The goods that we manufacture is not directly involved in killing and fighting." (page 4)

The Government also contended that there was a

> ". . . basis in fact for petitioner's I-A-O classification (and that) was his admission before the Departmental hearing officer that Community Industries for which he worked manufactured tents, WAC uniforms, candy for army rations . . ." (page 7)

To sustain its contention that the Writ of Certiorari ought not to be granted the Government relied, among others, on *United States v. Van Hook* (supra), and *United States v. Moore* (supra), and upon such reliance asked the Supreme Court that the Petition of *Parker* for a Writ of Certiorari be denied.

Exactly the same argument was presented by the Government in the case of *United States v. Richard Harshman,* 371 US 938, 75 S Ct 318. After the Supreme Court granted certiorari in both cases (supra), the United States suggested to the Supreme Court (it may be such suggestion was made to avoid the determination of the issue) that the judgment be vacated and the cases of *Parker* and *Harshman* be remanded to the United States District Court for the Northern District of Illinois with instructions to dismiss. The

Supreme Court acted on the suggestion and remanded the cases to the District Court to dismiss (372 US 607; 83 S Ct 955 and 372 US 608; 83 S Ct 955). By remanding the *Parker* and *Harshman* cases to the District Court for dismissal without remanding it to the Court of Appeals to vacate its judgment, the decisions of the Seventh Circuit (*Moore,* 217 F 2d 428, *Van Hook,* 284 F 2d 489, *Parker,* 307 F 2d 585, and *Harshman,* 307 F 2d 590) still stand for the proposition that one who claims to be conscientiously opposed to war cannot make any contribution to the war effort, such as paying his taxes used for the war, and therefore, this Court ought to hold that the Trial Court erred in dismissing the Complaint.

II

COMPELLING APPELLANTS TO CONTRIBUTE TO THE WAR EFFORT BY PAYMENT OF TAXES DEPRIVES THEM OF THEIR RIGHT TO MAINTAIN THEIR CONSCIENTIOUS OBJECTION TO WAR AND THUS INTERFERES WITH THEIR FREE EXERCISE OF THEIR RELIGIOUS BELIEFS CONTRARY TO THE FIRST AMENDMENT.

Appellee contends (pp 3 and 4 of Brief) that the Appellants failed

> ". . . to show how a tax imposed on income can in any way reach the Establishment or Free Exercise Clauses of the First Amendment."

Appellee fails to understand or pretends to an inability to do so, that compelling Appellants to pay such substantial part of their taxes which is used for the

war effort does, in fact, strike at the very core of their conscientious objector's religious tenet.

It may be helpful to the Court to recall the experience of an Eighteenth Century Quaker, William Rotch, who incidentally was the owner of the three ships which brought the famous cargo of tea to Boston in 1773. He was not only a large ship owner but was also the chief proprietor of Nantucket whaling fleet.[1] Rotch had taken a large stock of muskets and bayonets in payment of a debt; the muskets he sold as fowling-pieces to his whalers to shoot game and sea fowl in their coasting voyages. The bayonets he refused to sell. At the outbreak of the war both British and Americans wished to get hold of his stock. The American authorities sent over to requisition them, but Rotch refused, and said:

> "The time had now come to support our testimony against war or forever abandon it . . . My reason for not furnishing the bayonets were demanded, and I answered: 'As this instrument is purposely made and used for the destruction of mankind and I cannot put into one man's hand to destroy another that which I cannot use myself in the same way, I refuse to comply with thy demand.' "

This Quaker's refusal to contribute to the war effort brought about threats to his life but he remained unmoved and as for the bayonets, he said:

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[1]Vide Memorandum written by William Rotch in the Eighttieth year of his age (printed by Houghton Mifflin Co., Boston and New York, 1916).

> "I would gladly have beaten them into pruning hooks. As it was, I took an early opportunity of throwing them into the sea."

For this he was summoned before a court-martial where he expressed his position and as Mr. Rotch recalls it in his memoirs

> "The chairman of the committee, one Major Hawley, a worthy character, then addressed the committee, and said: 'I believe Mr. Rotch has given us a candid account of the affair, and every man has a right to act consistently with his religious principles. But I am sorry we cannot have the bayonets for we want them very much.' The Major was desirous of knowing more of our Friends' principles, on which I informed him as for as he inquired. One of the committee (Judge Parr), in a pert manner, observed: 'Then your principles are passive obedience and non-resistance.' I replied: 'No, my friend, our principles are active obedience and passive suffering.' I passed through no small trial on account of my bayonets."[2]

The Appellants say as Mr. Rotch said

> "The time had now come to support our testimony against war or forever abandon it . . ."

because contrary to Appellee's contention, Appellants maintain that compelling them to pay their tax money to purchase "bayonets" nullifies their conscientious opposition to the war which is the core of their relig-

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[2]M. E. Hirst, The Quakers in Peace and War, London: The Swarthmore Press Ltd., Ruskin House, 40 Museum Street, W. C. I, New York: George H. Doran Company, p. 395.

ious beliefs. Contrary to Appellee's contention that Appellants being forced to pay for war taxes does not more than simply burden the exercise of their conscientious objection, but withal it deprives this conscientious posture of any meaning. In fact, as we pointed out in our Opening Brief (p 17) the exaction from Appellants and the use of a large part of their taxes for the war effort is

"a tax laid specifically on the exercise . . ."

of their religious beliefs.

The Appellants contend that it is a question of fact for them to establish that support of war efforts through the use of their tax money does truly prevent the exercise of their conscientious objection and religious tenets, and therefore, it was an error on the part of the Trial Court to deprive them of their duty in Court, and because of that error, a reversal is required by this Court.

It may not be amiss to analyze Appellee's position which seems to be the following: If a tax is levied in a manner which prevents or interferes with the conventional expression of religious beliefs such as going to church or partaking in religious rituals, the exaction of the tax would be unconstitutional. However, when religious belief is more subtle and may not be found in the conventional ritual such as the posture of the Appellants, then the tax becomes proper and the Court may not interfere with such exaction. However, as we have shown in our original Brief (pp 22 and 31 ff) this is not a distinction that can be drawn under the command of the First Amendment.

While the Appellee contends that the exemption of conscientious objectors from duty of bearing arms is a Congressional grant, Appellants contend that this grant is nothing more but an expression by Congress of an already pre-existing constitutional right. They are bold to say that if Congress were to repeal the law (50 USC 456 (j) as amended) granting exemption for military service for conscientious objectors, then undoubtedly our Courts under the command of the First Amendment would find that the right to such exemption exists without Congressional enactment. It appears to us that Appellee agrees with the above contention when it says (p 11 of its Brief) that

> "It is one thing to compel a person to take part physically in combat or to wear a military uniform against his religious convictions . . ."

The distinction thereafter attempted to be drawn by the Appellee is without meaning under the First Amendment, because there is no difference between supporting the war effort by physical combat or by other means as we set forth hereinabove on the basis of the Court decisions in the *Van Hook, Moore, Parker and Harshman* cases.

Appellee points to the *Board of Education v. Allen* (36 U.S. Law Week 4538, 4541), wherein it is said

> ". . . it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion, Abington School District v. Schempp, 374 U.S. 203, 223***."

Appellants believe that they did heretofore, both in their original as well as in their Reply Brief, show that the exaction of war taxes from them has a coercive effect upon the practice of their conscientious objection, and in fact, makes such objection which is their religious tenet, wholly meaningless.

Appellee cites *Girouard v. United States,* 328 US 61 and emphasizes the holding by the Supreme Court to the effect that

> "It is recognition by Congress that even in time of war one may truly support and defend our institutions though he stops short of using weapons of war."

That is what Appellants contend. They contend first that exacting from them that part of the income tax which buys "bayonets" is a complete suppression of their free exercise of religion. Secondly, they contend, as they did in their Opening Brief that the Republic will stand, in fact, may increase in strength and posture, if they are permitted, as they are ready to do, to support and defend our institutions by means other than the use of weapons of war, such as contributions to the purchase of implements of war.

CONCLUSION

The Appellants submit that for the reasons set forth in their Opening Brief and for the reasons herein set forth, the Order of the Trial Court dismissing the Complaint ought to be reversed and the case be remanded to the Trial Court so that the Appellants may have their day in Court.

Dated, Carmel, California,
October 4, 1968.

Respectfully submitted,
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